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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 299

H. G. MAISON, Salem, Oregon, individually and as Superintendent, Department of State Police of the State of Oregon; ROBERT Y. THORNTON, Salem, Oregon, individually and as Attorney General of the State of Oregon; J. H. VAN WINKLE, Oregon City, Oregon; MAX WILSON, Joseph, Oregon; RALPH T. RENNER, Lakeview, Oregon; KENNETH G. DENMAN, Medford, Oregon; and ROLLIN E. BOWLES, Portland, Oregon, individually and as members of the State Game Commission of the State of Oregon; and GEORGE L. ANDERSON, La Grande, Oregon, individually and as District Attorney of Union County, Oregon,

Petitioners,

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, Pendleton, Oregon, and Elias J. Quaempts, Rt. 1, Pilot Rock, Oregon; William Minthorn, Rt. 1, Pendleton, Oregon; David S. Hall, Box 496, Pendleton, Oregon; Joseph T. Johnson, Rt. 1, Pendleton, Oregon; Arthur Motanic, Rt. 1, Pilot Rock, Oregon; Joseph T. Williams, Gibbon, Oregon; Louise M. Elk, Rt. 1, Pendleton, Oregon; and Jesse Jones, P. O. Box, Pilot Rock, Oregon, each on its or his own behalf and as representative of the members of the Confederated Tribes of the Umatilla Indian Reservation, Pendleton, Oregon,

Defendants.

PETITION FOR A WRIT OF CERTIORARI

ROBERT Y. THORNTON
Attorney General for Oregon
Salem, Oregon 97310
ARTHUR G. HIGGS
Assistant Attorney General
1400 S.W. 5th Avenue
Portland, Oregon 97201
ROY C. ATCHISON
Assistant Attorney General
1634 S.W. Alder St.
Portland 8, Oregon, of Counsel

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Defendants.

PETITION FOR A WRIT OF CERTIORARI

The petitioners, H. G. Maison, Salem, Oregon, individually and as Superintendent, Department of State Police of the State of Oregon; Robert Y. Thornton, Salem, Oregon, individually and as Attorney General of the

State of Oregon; J. H. Van Winkle, Oregon City, Oregon; Max Wilson, Joseph, Oregon; Ralph T. Renner, Lakeview, Oregon; Kenneth G. Denman, Medford, Oregon; and Rollin E. Bowles, Portland, Oregon, individually and as members of the State Game Commission of the State of Oregon; and George L. Anderson, La Grande, Oregon, individually and as District Attorney of Union County, Oregon, pray that a writ of certiorari issue to review the judgments of the Circuit Court of Appeals for the Ninth Circuit and the District Court of the United States for the District of Oregon.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 314 Fed.2d 169 and is set out in App. A, pp. 15, infra. The opinion of the District Court of the United States for the District of Oregon is reported at 186 Fed. Supp. 519 and is set out in App. B, p. 29, infra.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit Court affirming the judgment of the District Court of the United States for the District of Oregon was dated and entered February 15, 1963. The judgment of the District Court of the United States for the District of Oregon was dated and entered June 10, 1960. On the 19th day of May, 1963 an order granting an extension of time to July 18, 1963 to enter a writ of certiorari was granted by Associate Justice W. O. Douglas.

The jurisdiction of this Court is invoked under Title 28, USCA sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Treaty of June 9, 1855, 12 Stat. 945 guarantees the Umatilla Indians the right to fish at their usual and accustomed stations free of restriction or control of state conservation laws and regulations promulgated thereunder.

2. Whether a court of the United States is authorized to substitute its judgment for that of the state conservation agencies and prescribe alternate methods of achieving conservation of a state resource.

TREATIES AND STATUTES INVOLVED

The treaty provisions involved are Art. I of the Treaty of June 9, 1855 12 Stat. 945 with the Confederated Tribes of the Umatilla Reservation as set out in App. E, p. 38, infra.

The statutes involved are ORS 496.160, 496.190 and 496.010(3)(d) set out in App. C, p. 35.

STATEMENT

Prior to June 9, 1855, the Confederated Tribes of the Umatilla Indian Reservation occupied a large area of land in what is now southeastern Washington and northeastern Oregon. On June 9, 1855 the tribe executed a treaty with the United States of America ceding most of the territory it occupied and reserving to itself lands in what is now Umatilla County, Oregon. Article I of the Treaty assured the tribe:

"That the exclusive right of taking fish in the

streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them."

Since execution of the treaty, the tribe has continued to utilize its off-reservation treaty rights, particularly after 1914 when the United States government built a dam across the Umatilla River about three miles above its mouth and virtually destroyed the salmon runs that had previously migrated into the reservation.

The bulk of the off-reservation fishing was done at Celilo Falls on the Columbia River. In 1956, with the completion of the Dalles Dam by the United States government, Celilo Falls was inundated and the Indians were paid some 27 million dollars for its loss, a portion of which was allotted to the Umatillas.

After the loss of Celilo Falls, the Umatillas began to fish in other places, setting the stage for this case. Three Umatilla Indians were fishing on Catherine Creek in a usual and accustomed station. Catherine Creek is a tributary of the Grande Ronde River which, in turn, is a tributary of the Snake River, which flows to the Columbia River and ultimately to the sea. These Indians were fishing with gaff hooks for spring chinook salmon, which is the species of fish involved in this case, during the time the season for taking salmon was closed by regulation of the Oregon State Game Commission.

The spring chinook salmon is so-called because it ascends the rivers in the spring of the year and "holds over" in pools until late summer, around September, when it moves out on to relatively shallow gravel bars and spawns. Spawning is accomplished by digging a hole or "redd" in the gravel where the female salmon deposits her eggs to be fertilized by the male. The process is repeated upstream over and over, the material removed from the redd by each successive spawning covering the previously deposited eggs. After spawning, the fish die and their bodies supply nutrients to the water for the benefit of aquatic life upon which the newly-hatched salmon can feed. The young salmon descend the river to the ocean where they reach their maturity in from three to five years and again migrate to the place of their birth to repeat the cycle. When the salmon are in the ocean they are subjected to troll and sport fisheries. Also, when they ascend the rivers they are subjected to a gill-net fishery below Bonneville Dam, some one hundred and twenty miles from the sea on the Columbia River, and to a sport fishery both below and above Bonneville Dam and in the various tributaries of the Columbia River. Since the salmon does not eat upon entering fresh water, its flesh upon leaving the sea is extremely rich in oils and other stored nutrients. Its eggs are tiny and undeveloped, and the stored up nutrition is necessary to supply the salmon with enough energy to swim the many many hundreds of miles to its natal stream, to hold over and to develop its eggs. By the time it is ready to spawn, stream conditions are at an optimum, low and

clear, and the salmon at this stage are particularly vulnerable to predation.

The flesh of the salmon has lost its rich qualities, the fish is invariably diseased and it has only energy enough left to spawn, after which it expires.

At this stage, when the salmon is at its lowest ebb as a food item, but at its highest value as a propagator of its kind, and is most vulnerable to its enemies, the Oregon State Game Commission closes the season to allow it to lay its eggs unmolested. The fish which hatch will ultimately (those that survive the man-made rigors of depleted water supply, pollution, hydroelectric projects, irrigation diversions—to say nothing of their natural foes) will return to the stream of their birth and no other. Once a stream losses its stock of salmon, it is lost forever, as no others will enter it. The others have a destination of their own. There is no known method by which a barren stream can be restocked with any guarantee of success.

The Indians involved in this case were snagging the salmon off the shallows with gaff hooks during the closed season, when apprehended by the State Police. They subsequently brought this action to obtain a judgment declaring their treaty rights and to enjoin the defendants from enforcing the game regulations against them, claiming that the treaty right was superior to the state laws and regulations. They proceeded under 28 USC sec 1331 relating to federal questions and 28 USC sec 2201 relating to The Federal Declaratory Judgments Act.

Both the plaintiffs and defendants below conceded

that the holding in the case of *Tulee v. Washington*, 315 U.S. 681, was controlling. In that case the State of Washington convicted a Yakima Indian, Tulee, of fishing without a license. The treaty provision under which Tulee claimed immunity is verbatim with the treaty provision involved in this case. This court said and held in the Tulee case:

> "The state does not claim power to regulate fishing by the Indians in their own reservation. *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; nor does it deny that treaty rights of Indians, whatever their scope, were preserved by Congress in the Act which created the Washington Territory and the enabling Act which admitted Washington as a state. 10 Stat. 172; 25 Stat. 676; relying upon its broad powers to conserve game and fish within its borders. (*Geer v. Connecticut*, 161 U.S. 519; *Ward v. Racehorse*, 163 U.S. 504, 507; *Patsone v. Pennsylvania*, 232 U.S. 138; *LaCosta v. Dept. of Conservation*, 263 U.S. 545, 549). However, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense, which although within the territory originally ceded by the Yakimas, is outside of their reservation. It argues that the treaty should not be construed as an impairment of this right, and that, since its license laws do not discriminate against the Indians, they do not conflict with the treaty.
>
> "The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the 'usual and accustomed places,' free from the state regulation of any kind.
>
> "We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the

time and manner of fishing outside the reservation as are necessary for the conservation of fish. (*Kennedy v. Becker*, 241, U.S. 556. See *United States v. Winans*, supra 384.) it forecloses the state from charging the Indians a fee of the kind in question here."

The plaintiffs below relied further on the case of *Makah v. Schoettler*, 192 Fed.2d 224. In this case the Makah Tribe wanted to fish in a coastal stream which was closed to all fishing except by angling. The State of Washington had closed the stream assertedly because it was too expensive to police a fishing season which admittedly would have allowed a restricted fishery to exist without damaging the resource. The Ninth Circuit Court of Appeals in deciding in favor of the tribe, held that the state could not deprive the Indians of their treaty rights on the stream merely because the cost of preventing the Indians from exceeding the treaty right was excessive, and held further that since a partial closure could have been imposed on the Indian fishery without injury to the resource; that the state, therefore, had failed to prove that the regulation which was under attack was necessary for the conservation of fish, citing the *Tulee* case.

In the instant case, the District Court below was of the opinion that in order for the State of Oregon to enforce its closure to fishing, it must prove that the challenged regulation was necessary for conservation. After much testimony was given by the state concerning the necessity for the regulation, the District Court held that the state had failed to prove that the regulation con-

cerned was necessary for conservation and held that the treaty gave to the tribe the right to fish without restriction or control under the game laws of the State of Oregon or the regulations issued pursuant thereto. (App. F)

An appeal to the Circuit Court of Appeals for the Ninth Circuit was duly made and the judgment of the Ninth Circuit Court in affirming the decision of the District Court held that in order for the state to justify any regulation curtailing the Indian fishery, the regulation must be indispensable to conservation.

REASONS FOR GRANTING THE WRIT

1. The construction of the treaty right by the courts below whereby the tribe is guaranteed off-reservation fishing rights is not in accord with applicable decisions of this Court.

This Court has been asked to construe Indian treaty hunting and fishing rights versus state conservation laws several times. In every case the state has been upheld in its exercise of sovereign authority to exercise its police power over its citizens and its fish and game resources for the benefit of all its citizens. In *Ward v. Race Horse*, 163 U.S. 504 this Court held:

> "The power of the state to control and regulate the taking of game cannot be questioned . . . to suppose that the words of the treaty intended to give to the Indian the right to enter into already established states and seek out every portion of unoccupied government land and there exercise the right of hunting in violation of the municipal law, would be

to presume that the treaty was drawn as to frustrate the very object it had in view . . . this fact does not justify the implication that the treaty authorized the continued enjoyment of the right of killing game therein, when the territory ceased to be a part of the hunting districts . . . the states have full power to regulate within their limits matters of internal police . . . . on her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states . . . indeed, it may be further, for the sake of argument, conceded that where there are rights created by congress during the existence of a territory, which are of such a nature as to imply their perpetuity and the consequent purpose of congress to continue them in the state after its admission, such continuation will, as a matter of construction, be upheld although the enabling Act does not expressly so direct.

"Doubtless the rule that treaties should be so constructed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of congress, and also destructive of the rights of one of the states.

"States when admitted to the Union are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted. This repels any presumption that in this particular case congress intended to admit the state of Wyoming with diminished government authority."

In *New York ex rel Kennedy v. Becker*, 241 U.S. 556, this Court held:

"We are of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in com-

mon with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged; which inhered in the sovereignty of the state over the lands where the privilege was exercised. This was clearly recognized in *US v. Winans*, 198 U.S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the U.S. and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does it" (that is the right of taking fish at all usual and accustomed places) "restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised."

In the case of *Tulee v. Washington* the state contended that its right to regulate fishing may be exercised at places like the scene of the alleged offense (a usual and accustomed station) which although within the territory originally ceded by the Yakimas, is outside of their reservation. It argued that the treaty should not be construed as an impairment of this right, and that, since its license laws did not discriminate against the Indians, they did not conflict with the treaty.

The appellant (Indian) on the other hand, claimed that the treaty gave him an unrestricted right to fish in the "usual and accustomed places," free from state regulation of any kind. The Court said:

"We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a regulatory nature concerning the time and man-

ner of fishing outside the reservation as are necessary for the conservation of fish (citing *Kennedy v. Becker, United States v. Winans*) it forecloses the state from charging the Indians a fee of the kind in question here."

In the instant case, the Umatilla Tribe argued that it should be allowed to an unrestricted right to fish on its usual and accustomed places free from state regulation of any kind. The District Court, affirmed by the Circuit Court of Appeals, ruled in favor of the tribe and in its judgment stated that the tribe could fish in its usual and accustomed places without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto (Judgment App. F).

This is clearly contrary to applicable decisions of this Court in this field which were reviewed as recently as 1962 in the case of *Organized Village of Kake v. Egan*, 82 S.Ct. 562, 369 U.S. 60, where Justice Frankfurter speaking for this Court said:

> "Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation. *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244; *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in Tulee to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557, *Moore v. U.S.*, 157 F.2d, 760, 765 (C.A 9th Cir.). See *State v. Cooney*, 77 Minn., 518, 80 N.W. 696.
>
> "* * * * *
>
> "This Court has never held that states lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy.

Because of the migratory habits of salmon, fish traps at Kake and Angoon, are no merely local matter."

2. The Circuit Court of Appeals for the Ninth Circuit has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

When this Court stated in the case of *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115, that the state could impose upon Indians such regulations as were necessary for conservation, it necessarily implied that someone would have to make a determination somewhere along the line as to what regulations are necessary for conservation. Petitioners assert that the appropriate state fish conservation agency has that power and when the lower court sanctioned by the Court of Appeals, requires the conservation agency to prove that its regulations are necessary, and then makes a finding that the regulations are not necessary and prescribes three methods by which the Court believes the same result can be obtained, without a finding that the state agency exceeded its constitutional or statutory powers, or that the regulation was not supported by substantial evidence, or that the regulation was not reasonable or was arbitrary, the Court has exceeded its authority, usurped the power of the state agency and has substituted its own view concerning what should be done and by doing so has departed from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision. 73 CJS 548 *Public Administrative Bodies and Procedure sec. 202; U.S. v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 66 S.Ct. 687.

CONCLUSION

From a review of the decisions of this Court to date and a review of the opinions of the lower courts it is clear that the decisions of the lower courts are not in accord with the applicable decisions of this Court. Before and since the *Tulee* case this Court has always upheld the state's right to enforce its conservation laws whenever they have conflicted with off-reservation Indian rights, and since the *Tulee* case, the lower courts always held the treaty rights superior to state conservation laws. In so doing, the lower courts, by requiring the states to prove necessity for regulation and by prescribing alternate conservation methods to be used by the states, have so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

The petition should be granted.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General for Oregon
Salem, Oregon 97310
Counsel for Petitioners

ARTHUR G. HIGGS
Assistant Attorney General
1400 S.W. 5th Avenue
Portland, Oregon 97201

ROY C. ATCHISON
Assistant Attorney General
1634 S.W. Alder St.
Portland 8, Oregon
Of Counsel for Petitioners

APPENDIX A

H. G. MAISON, Individually and as Superintendent, Dept. of State Police of the State of Oregon, et al., Appellants,

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION et al., Appellees.

No. 17139.

United States Court of Appeals
Ninth Circuit.
Feb. 15, 1963.

Indians brought action against the Oregon Game Commission and state law enforcement officials for a declaratory judgment that state regulations restricting salmon and steelhead fishing were not applicable to the Indians and for an injunction. The United States District Court for the District of Oregon, Gus J. Solomon, J., 186 F.Supp. 519, entered judgment for the Indians, and the Commission and the state law enforcement officials appealed. The Court of Appeals, Koelsch, Circuit Judge, held that evidence of the Commission and state law enforcement officials was insufficient to sustain their burden of proving that state regulations restricting salmon and steelhead fishing were necesary for conservation of fish and were required to be enforced against the Indians outside their reservation.

Judgment affirmed.

1. Courts

Statute providing that where injunction is sought restraining enforcement or execution of state statute or order of administrative agency acting thereunder, on ground of unconstitutionality of statute, matter must be determined by district court composed of three judges was not applicable in suit by Indians against state officials, where issue was not whether state statute or regulations of state game commission were unconstitutional but whether valid statute and regulations can be applied to Indians. 28 U.S.C.A. §§ 1331, 2201, 2281.

2. Indians

Restriction of fishing of Indians is justifiable only if necessary conservation cannot be accomplished by restriction of fishing of others.

3. Indians

Evidence of Oregon Game Commission and state law enforcement officials was insufficient to sustain their burden of proving that state regulations restricting salmon and steelhead fishing were necessary for conservation of fish and were required to be enforced against Indians outside their reservation. Treaty between the United States and the Walla-Walla, Cayuses and Umatilla Tribes and Bands of Indians, June 9, 1855, art. 1, 12 Stat. 945.

4. Evidence

Trier of fact was not bound to adopt conclusion of expert witnesses where it was contrary to his best judgment.

5. Constitutional Law

Restriction of fishing activities of citizens is valid if reasonable as required by Fourteenth Amendment to federal Constitution. U.S.C.A. Const. Amend. 14.

6. Constitutional Law

Complete exclusion of sports fishermen from spawning grounds of salmon and steelhead fish would not amount to arbitrary discrimination against them, though Indians would be permitted to fish there, since State possesses broader power to regulate sports fishing than it does to regulate fishing by Indians. Treaty between the United States and the Walla-Walla, Cayuses and Umatilla Tribes and Bands of Indians, June 9, 1855, art. 1, 12 Stat. 945; U.S.C.A. Const. Amend. 14.

Robert Y. Thornton, Atty. Gen. of Oregon, Arthur G. Higgs and Roy C. Atchison, Asst. Attys. Gen., Salem, Or., for appellant.

Frank E. Nash, Mark C. McClanahan, King, Miller, Anderson, Nash & Yerke, Portland, Or., for appellees.

Before HAMLIN, MERRILL and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge.

This case involves fishing rights of the Confederated Tribes of the Walla Walla, Cayuse and Umatilla Indians under a treaty with the United States.

[1] The District Court had jurisdiction under the provisions of 28 U.S.C. § 1331, relating to federal questions, and 28 U.S.C. § 2201, the Federal Declaratory

Judgments Act. The provisions of 28 U.S.C. § 2281, requiring a three-judge court are not applicable and trial was properly had before a single judge.[1] Jurisdiction is conferred upon this court under the provisions of 28 U.S.C. § 1291.

It appears that late in May of 1855 a joint council was held at Camp Stevens in the Walla Walla Valley of the State of Washington between representatives of the United States and certain Indian tribes of Washington and Oregon. At that council the plaintiffs' ancestors were persuaded to accept a treaty containing the following provision:

> "*Provided, also*, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them."[2]

---

[1] 28 U.S.C. § 2281 provides that where an injunction is sought restraining the enforcement or execution of a state statute or an order of an administrative agency acting thereunder, upon the ground of the unconstitutionality of such statute, the matter must be determined by a district court composed of three judges. But that provision has no application to this litigation, for the issue is not whether a statute of the State of Oregon or a regulation of its Game Commission is unconstitutional; rather, the issue is whether statutes and regulations, admittedly valid, can be applied to these plaintiffs. See Phillips v. United States, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941).

[2] Treaty with the Walla Walla, Cayuses, and Umatilla Tribes and Bands of Indians, June 9, 1855, Art. I, 12 Stat. 945.

The controversy here concerns that portion of the treaty provision which relates to the Indians' right to fish outside their reservation "in common with citizens of the United States."

In 1958 the Oregon State Game Commission promulgated regulations prohibiting fishing on tributaries of the Columbia and Snake Rivers during part of the year. Shortly thereafter, the Commission caused three Indians to be arrested for fishing during the closed season in certain Blue Mountain streams that run into the Columbia. It further threatened to have arrested any members of the Confederated Tribes who fished contrary to the laws and regulations of Oregon.

Contending that the state's restriction of their fishing activities was contrary to the rights guaranteed them by treaty, the Confederated Tribes and several of its tribesmen sought a declaratory judgment and injunction. The court's judgment was generally favorable to the Indians:

> "Ordered, Adjudged, and Decreed that the Confederated Tribes of the Umatilla Indian Reservation and the members thereof have a right, privilege, and immunity afforded them under the Treaty of June 9, 1855, between said Tribes and the United States of America, to catch salmon and steelhead for subsistence purposes at all usual and accustomed stations on tributaries of the Columbia and Snake rivers in Oregon, including the John Day, Walla Walla, Grande Ronde, and Imnaha river systems, without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto."

Although the court declined to issue an injunction, it retained jurisdiction to grant such relief. The defendants have appealed.

The extent of Indian fishing rights under a treaty between the United States and the Yakima Indians was in issue in United States v. Winans, 198 U.S. 371, 25 S. Ct. 662, 49 L.Ed. 1089 (1905). The court observed that prior to the treaty the Indians had unlimited fishing rights:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381, 25 S.Ct. 664.

Explaining the effect of the treaty upon those rights, the court continued:

> "New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—*a reservation of those not granted.*" (Emphasis added). *Ibid.*

The treaty involved in the instant case is substantially similar to the Yakimas' treaty and was negotiated at the same common council. Thus, the Supreme Court's analysis applies equally here. We hold that the plaintiffs' treaty reserves to them those unimpeded fishing rights

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The trial court's opinion is reported at D.C., 186 F.Supp. 519.

which their ancestors had long enjoyed before the treaty, subject only to the qualifications contained within that document. But, the question remains, what are those qualifications?

One of them was pointed out in the Winans case. There it was stated that, because of the provision that the Indians were to fish "in common with citizens," the Indians had not retained an exclusive right to fish at their usual and accustomed stations. Citizens might share it. United States v. Winans, supra at 381.

Another of the qualifications was explained in *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942) and Makah Indian Tribe v. Schoettler, 192 F.2d 224 (9th Cir. 1951). In the former case it appears that one Tulee, an Indian, was convicted of catching salmon without a license required by a statute of the State of Washington. Tulee claimed the protection of the same treaty that was involved in the Winans case, arguing that it gave him a right to fish without restriction "at all usual and accustomed places" within the ceded area. The State countered with the argument that, because of the phrase "in common with citizens" the appellant's rights were no greater than those of other citizens. The court did not wholly approve either contention, but said:

> "We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a

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[2] Of course, this does not mean that a state cannot, by reasonable laws and regulations, exclude from fishing those of its citizens who are not parties to the treaty.

purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish;* it forecloses the state from charging the Indians a fee of the kind in question here." (Emphasis added). Tulee v. Washington, supra, 315 U.S. at 684, 62 S.Ct. at 864.

We applied the doctrine of the Tulee case in Makah. In that case the State of Washington had, by regulation, prohibited the catching of fish in the Hoko River except with a certain type of gear. As justification for the application of its regulation to the Indians, the State argued that the provision in the Makah Indians' treaty granting to them the right to fish "in common with all citizens" meant that the rights of the Indians were the same, and no greater, than those possessed by other citizens. However, rejecting that argument, we said: "The Supreme Court held in the Tulee case that where a treaty guarantees certain fishing rights to Indians and a state regulation impairs this right, the state must prove that its regulation is 'necessary' * * *." Makah Indian Tribe v. Schoettler, supra, 192 F.2d at 226.

Thus, in both the Tulee and Makah cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.

Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly

explain the life cycle of the salmon and steelhead fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up, and they are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food. In support of that contention they cite the testimony of three expert witnesses; namely, Robert N. Thompson, a fishery biologist of the Fish Commission of Oregon, Richard T. Pressey, Supervisor of Research for the Department of Fisheries of the State of Washington, and Dr. H. John Rayner, Chief of the Wildlife Research Division of the Oregon State Game Commission.

Thompson's testimony, to the effect that unrestricted fishing of sufficient industry could exhaust the spawning beds, is a proposition about which there can be no quarrel. However, he did not relate that proposition to the facts of this case, but, on the contrary, testified that the plaintiffs have never shown a disposition to fish with marked intensity.

Pressey testified that commercial fishing by Indians on spawning grounds in the State of Washington had seriously reduced some runs; further, that the taking of fish by the plaintiffs for their own subsistence would have a similar, although not as serious, effect. However, the trial court was not bound to accept this testimony. It was largely based upon the reports of an interested party; furthermore, the witness acknowledged that the number of fish had been increasing in the Blue Mountain streams in recent years and that, in the absence of depletion, there would be no need for regulation.

Dr. Rayner testified that the taking of fish from the spawning grounds creates an "unhealthy situation," that it is inconsistent with "efficient conservation methods," that "indiscriminate" fishing endangers the fish life of a stream, and that fish "must be protected" in their spawning beds. These statements are ambiguous and vague, but even if they reflected an opinion of the witness that restriction of plaintiffs' fishing was necessary for conservation, nevertheless, that opinion was not binding on the trial court.

In Dr. Rayner's view, "conservation" is a term which involves a compromise of the competing interests of the

many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that, by "conservation," the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word "conservation" in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, "I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether."

[2] Such a statement is not evidence of that "necessity for conservation" required by the Tulee case. In that case the Supreme Court held that a regulation, to be necessary, must be "indispensable" to the effectiveness of a state conservation program. It follows that restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others. Dr. Rayner, in testifying that a limitation of plaintiffs' fishing was necessary, not only ignored that requirement, but based his opinion on the contrary premise that the taking of fish by Indians can validly be restricted to satisfy the needs of the rest of society.

[3, 4] But even if the trial judge disregarded the many deficiencies and contradictions in the experts' testimony and attributed to that testimony some probative value on the issue of necessity, nevertheless, his decision that the defendants failed to sustain their burden of

proof on that issue must be upheld. The trier of fact is not bound to adopt the conclusion of experts where it is contrary to his best judgment. United States v. Hill, 62 F.2d 1022 (8th Cir. 1933); Tracy v. Commissioner, 53 F.2d 575 (6th Cir. 1931), cert. denied, 287 U.S. 632, 53 S.Ct. 83, 77 L.Ed. 548 (1932). The trial judge could justifiably doubt the validity of the experts' conclusions in view of the other evidence that the number of fish taken by the plaintiffs is only a small percentage of the total salmon and steelhead harvest; that the plaintiffs have never, in over a century, destroyed a salmon run in the Blue Mountain streams or so depleted a run that destruction was threatened; and that, not only has the number of fish in these streams been increasing in recent years, the population of the Confederated Tribes is small and probably is declining.[9]

Because the court found that no conservation was necessary its broadly worded judgment, applying to any laws or regulations of the State of Oregon, is proper. Of course, a substantial change in conditions may warrant the later imposition of restrictions upon plaintiffs' fishing.

In its opinion the trial court stated:

> "Although the closure of streams during portions of the year is one method of conserving the resource and may be generally fair and convenient, it cannot be permitted to curtail treaty fishing rights of Indians

[9] In 1855 there were approximately 1500 Indians in the Confederated Tribes: at the time of the trial they numbered only about 1200.

where there are alternative methods of attaining the same objectives."[9]

It is apparent from this that the judgment not only was grounded upon a finding that no restriction of plaintiffs' fishing was necessary, but also, upon a finding that if it was necessary, the laws and regulations specifically involved in this case could not be imposed.

But the defendants argue that none of the alternative conservation measures specifically enumerated in the trial court's findings were available. For example, one of those listed was that the defendants could achieve conservation by limiting or prohibiting the taking of fish by sportsmen on the spawning grounds, and defendants argue that to do this would violate the provisions of the treaty.

[5, 6] However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty [Tulee v. Washington, supra], a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as require by the Fourteenth Amendment to the United States Constitution. Thomson v. Dana, 52 F.2d 759 (D.Ore. 1931), aff'd. 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount

[9] Confederated Tribes of the Umatilla Indian Reservation v. Maison, 186 F.Supp. 519, 520-521 (D.Or. 1960).

to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The judgment is affirmed.

APPENDIX B

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, and Elias J. Quaempts, William Minthorn, David S. Hall, Joseph T. Johnson, Arthur Motanic, Joseph T. Williams, Louise M. Elk, and Jesse Jones, each on its or his own behalf and as representative of the members of the Confederated Tribes of the Umatilla Indian Reservation, Pendleton, Oregon; Plaintiffs,

v.

H. G. MAISON, individually, and as Superintendent, Department of State Police of the State of Oregon; Robert Y. Thornton, individually, and as Attorney General of the State of Oregon; J. H. Van Winkle, Max Wilson, Ralph T. Renner, Kenneth G. Denman, and Rollin E. Bowles, individually, and as members of the State Game Commission of the State of Oregon; and George L. Anderson, individually, and as District Attorney of Union County, Oregon; Defendants.

Civ. No. 77-59.
United States District Court
D. Oregon
June 10, 1960.

Action for a judgment declaring that state regulations restricting salmon and steelhead fishing in off-reservation tributaries of the Columbia and Snake Rivers could not be applied to members of Confederated Tribes of the Umatilla Indian Reservation because of rights reserved in Treaty with the Walla-Wallas, June 9, 1855, 12 Stat. 945, to take fish at all usual and accustomed stations, and for an injunction. The District Court, Solomon, Chief Judge, held that the evidence failed to sus-

tain defendants' burden of proving that challenged regulations were necessary for the conservation of fish.

Judgment for plaintiffs in accordance with opinion.

1. Indians

Treaty right of Indians to fish at all usual and accustomed stations was not unrestricted, but left state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside reservation as were necessary for the conservation of fish. Treaty with the Walla-Wallas, June 9, 1855, 12 Stat. 945.

2. Indians

States imposing regulatory restrictions on treaty rights of Indians to fish outside reservation must prove that such restrictions are necessary for conservation of fish.

3. Indians

In action against Oregon Game Commission and state law enforcement officials for a judgment declaring that state regulations restricting salmon and steelhead fishing in off-reservation tributaries of Columbia and Snake Rivers could not be applied to members of Confederated Tribes of the Umatilla Indian Reservation because of right reserved in treaty with the United States to take fish at all usual and accustomed stations, evidence failed to sustain defendants' burden of proving that challenged regulations were necessary for the conservation of fish, particularly in view of refusal of defendants to employ

alternative conservation methods. Treaty with the Walla-Wallas, June 9, 1855, 12 Stat. 945.

4. Indians

Where alternative methods of attaining the same objectives are available, treaty fishing rights of Indians may not be curtailed by state regulation closing streams to salmon and steelhead fishing during portions of the year, even though such method of conserving the resource may be generally fair and convenient.

Charles F. Luce, Walla Walla, Wash., Frank E. Nash and Robert S. Summers, Portland, Or., for plaintiffs.

Robert Y. Thornton, Atty. Gen., State of Oregon, and Arthur G. Higgs and Roy C. Atchison, Asst. Attys. Gen., for defendants.

SOLOMON, Chief Judge.

The Confederated Tribes of the Umatilla Indian Reservation and seven individual tribesmen brought this action for a declaratory judgment and an injunction against the Oregon Game Commission and various state law enforcement officials. They contend that State regulations which restrict salmon and steelhead fishing in off-reservation tributaries of the Columbia and Snake Rivers cannot be applied to them because of rights reserved in their tribe's treaty with the United States, executed June 9, 1855, 12 Stat. 945. In particular, plaintiffs claim that their treaty right to take fish at all "usual and accustomed stations" bars the state from prohibiting

accustomed Indian fishing in specified streams during any portion of the year.

Salmon and steelhead are anadromous fish which ascend from the ocean to fresh water streams to spawn. By instinct, each fish attempts to return to the stream of its birth. Many obstacles are encountered including natural predators, disease, commercial nets, anglers, dams, and water pollution. Severe decimation of a run of fish in any particular stream can result in the destruction of practically all of the fish in such stream. Experiments in stocking barren streams have been costly and sporadically successful.

The State contends that the high value of brood stock in preserving individual runs and the extreme vulnerability of fish on the beds justifies closing these streams during spawning seasons. It argues that the regulations in question are essential in preserving the resource.

[1, 2] All of the parties concede that the controlling authorities are Tulee v. State of Washington, 1942, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 and Makah Indian Tribe v. Schoettler, 9 Cir., 1951, 192 F.2d 224, 226. Those cases establish that a treaty right to fish in the usual and accustomed places is not unrestricted but "leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." Tulee v. State of Washington, supra, 315 U.S. at page 684, 62 S.Ct. at page 864. However, a state imposing

such restrictions must prove them necessary for conservation. Makah Indian Tribe v. Schoettler, supra.

[3] I find that defendants have failed to sustain this burden of proof. The fisheries in question have been traditionally utilized by the Indians for subsistence purposes. The number of fish taken by the Indians is a small percentage of the total Columbia River salmon and steelhead harvest. In 1957, the last year for which complete figures are available for these streams, sportsmen took 4,600 breeder fish which had actually arrived at their destined tributaries. Moreover, defendants' expert admitted that a greater escapement of spring chinook salmon to all of the upper Columbia River tributaries than is presently allowed would be beneficial in achieving maximum production, and that it would be good conservation practice to permit larger numbers of fish to reach the spawning beds.

Defendants admit that plaintiffs take these fish solely for subsistence purposes and that none of them are sold commercially. Defendants further admit that plaintiffs have never destroyed a salmon run in these streams or so severely depleted a run that destruction was threatened. Nevertheless, defendants assert that unrestricted Indian fishing on the spawning beds is potentially harmful. However, they have rejected the possibility of arranging substitute sites for plaintiffs on the Columbia River to relieve fishing pressure on the spawning beds and have made no effort to enter into cooperative regulations in order to further conservation goals.

[4] Although the closure of streams during portions of the year is one method of conserving the resource and may be generally fair and convenient, it cannot be permitted to curtail treaty fishing rights of Indians where there are alternative methods of attaining the same objectives. "The Supreme Court has repeatedly held that the Indian treaty fishing provisions accord to them rights against state interference which do not exist for other citizens." Makah Indian Tribe v. Schoettler, supra, 192 F.2d at page 226.

Plaintiffs shall submit findings of fact, conclusions of law, and a judgment in favor of plaintiffs, all in accordance with this opinion.

APPENDIX C

496.010 Definitions of "game fish."

(1) * * *.

(2) * * *.

(3) "Game fish," as used in ORS chapters 496, 497, 498 and 501, includes:

(a) * * * (b) * * * (c) * * *.

(d) The following salmon when under 15 inches in length or when being taken, caught or angled for with a hook and line, commonly called angling: *Oncorhynchus nerka*, commonly known as sockeye, red or blueback salmon; *Oncorhynchus tschawytscha*, commonly known as Chinook salmon, *Oncorhynchus kisutch*, commonly known as silver salmon; *Oncorhynchus keta*, commonly known as chum or dog salmon.

(4) * * *.

496.160. General powers of commission. (1) The game commission has:

(a) Full power and authority to formulate the general policies and programs of the state respecting the management, which, for the purposes of ORS 496.320 to 496.330, 496.415 and 496.505 includes protection, preservation, propagation and promotion of game fish, game animals, fur-bearing animals, other than domestic fur-bearing animals, game birds and nongame birds, other than domestic birds and fowls, within this state.

(b) Such further general powers as are necessary to carry out the provisions, purposes and objectives of the statutes listed in paragraph (k) of subsection (1) of ORS 496.145.

(2) The powers set forth in subsection (1) of this section are at all times subject to the law and to the rules and regulations of the Department of Finance and Administration in the purchase and disposal of property other than real property.

(3) The game commission has such other powers necessary to fully carry out the purposes and intent of all laws pertaining to hunting, angling and trapping and game propagation, distribution, protection and promotion.

(4) The game commission may make and declare such rules and regulations, and appoint such officers and employes as it deems necesary in the administration of its duties.

496.190 Procedure at January meeting of commission. At its stated meeting in January of each year, the game commission shall hold a hearing to find and determine what game fish may be taken, caught or angled for and of what species or kinds, in what numbers, quantities or bag limits, at what places, in what manner and at what seasons or times as will not affect injuriously the supply thereof. The meeting may be adjourned from time to time but not later than the last day of said month of January in which it is held. After the hearing the commission shall make written findings setting forth the species, kinds, numbers, quantities and bag limits of game fish that may be taken, caught or angled for and in what places, in what manner and at what seasons and times so as not to affect injuriously the supply thereof.

APPENDIX D

G.C. 73.

"The season is closed the entire year to angling for game fish not less than twenty inches in length of the species and kinds commonly known as steelhead trout; sockeye, red or blueback salmon, chinook salmon, chum salmon and silver salmon in all streams in Zones 7 and 9 except the following streams, which (exclusive of their tributaries unless listed) are open the entire year to angling for such fish unless otherwise specified and except in such portions hereinbefore designated as closed to angling."

"* * *

"CATHERINE CREEK below the City of Union water intake is open except from June 20 to December 31, both dates inclusive.

"* * *"

APPENDIX E

TREATY WITH THE WALLA WALLA, CAYUSE, ETC. 1855

June 9, 1855, 12 stats., 945
Ratified March 8, 1859
Proclaimed April 11, 1859

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, in the Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and Joel Palmer, superintendent of Indian affairs for Oregon Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Walla-Wallas, Cayuses, and Umatilla tribes, and bands of Indians, occupying lands partly in Washington and partly in Oregon Territories, and who, for the purposes of this treaty, are to be regarded as one nation acting for and in behalf of their respective bands and tribes, they being duly authorized thereto; it being understood that Superintendent I. I. Stevens assumes to treat with that portion of the above-named bands and tribes residing within the Territory of Washington, and Superintendent Palmer with those residing within Oregon.

Article 1. The above-named confederated bands of Indians cede to the United States all their right, title, and claim to all and every part of the country claimed by them included in the following boundaries, to wit:

Commencing at the mouth of the Tocannon River, in Washington Territory, running thence up said river to its source; thence easterly along the summit of the Blue Mountains, and on the southern boundaries of the purchase made of the Nez Perces Indians, and easterly along that boundary to the western limits of the country claimed by the Shoshonees or Snake Indians; thence southerly along that boundary (being the waters of Powder River) to the source of Powder River, thence to the head-waters of Willow Creek, thence down Willow Creek to the Columbia River, thence up the channel of the Columbia River to the lower end of a large island below the mouth of Umatilla River, thence northerly to a point on the Yakama River, Umatilla River, thence northerly to a point on the Yakama River, called Tomahluke, thence to Lo Lac, thence to the White Banks on the Volumbia below Priest's Rapids, thence down the Columbia River to the junction of the Columbia and Snake Rivers, thence up the Snake River to the place of beginning: *Provided, however*, That so much of the country described above as is contained in the following boundaries shall be set apart as a residence for said Indians which tract for the purposes contemplated shall be held and regarded as an Indian reservation; to wit: Commencing in the middle of the channel of Umatilla River opposite the mouth of Wild Horse Creek, thence up the middle of the channel of said creek to its source, thence southerly to a point in the Blue Mountains, known as Lee's encampment, thence in a line to the head-waters of Howtome Creek, thence west to the divide between

Howtome and Birch Creeks, thence northerly along said divide to a point due west of the southwest corner of William C. McKay's land-claim, thence east along his line to his southeast corner, thence in a line to the place of beginning; all of which tract shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without permission of the agent and superintendent. The said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, without any additional expense to the Government other than is provided by this treaty, and until the expiration of the time specified, the said bands shall be permitted to occupy and reside upon the tracts now possessed by them, guaranteeing to all citizen(s) of the United States, the right to enter upon and occupy as settlers any lands not actually enclosed by said Indians: *Provided, also,* That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens; is also secured to them. *And provided, also,* That if any band or bands of Indians, residing in and claiming any portion or portions of the country described in this article, shall not accede to the terms of this treaty, then the bands becoming parties hereunto agree to re-

serve such part of the several and other payments herein named, as a consideration for the entire country described as aforesaid, as shall be in the proportion that their aggregate numbers may have to the whole number of Indians residing in and claiming the entire country aforesaid, as consideration and payment in full for the tracts in said country claimed by them. *And provided, also*, That when substantial improvements have been made by any member of the bands being parties to this treaty, who are compelled to abandon them in consequence of said treaty, (they) shall be valued under the direction of the President of the United States, and payment made therefor.

Article 2. In consideration of and payment for the country hereby ceded, the United States agrees to pay the bands and tribes of Indians claiming territory and residing in said country, and who remove to and reside upon said reservation, the several sums of money following, to wit: eight thousand dollars per annum for the term of five years, commencing on the first day of September, 1856; six thousand dollars per annum for the term of five years next succeeding the first five; four thousand dollars per annum for the term of five years next succeeding the second five, and two thousand dollars per annum for the term of five years next succeeding the third five; all of which several sums of money shall be expended for the use and benefit of the confederated bands herein named, under the direction of the President of the United States, who may from time to time at his discretion, determine what proportion

thereof shall be expended for such objects as in his judgment will promote their well-being, and advance them in civilization, for their moral improvement and education, for buildings, opening and fencing farms, breaking land, purchasing teams, wagons, agricultural implements and seeds, for clothing, provision and tools, for medical purposes, providing mechanics and farmers, and for arms and ammunition.

Article 3. In addition to the articles advanced the Indians at the time of signing this treaty, the United States agree to expend the sum of fifty thousand dollars during the first and second years after its ratification, for the erection of buildings on the reservation, fencing and opening farms, for the purchase of teams, farming implements, clothing and provisions, for medicines and tools, for the payment of employes, and for subsisting the Indians the first year after their removal.

Article 4. In addition to the consideration above specified, the United States agrees to erect, at suitable points on the reservation, one saw-mill, and one flouring-mill, a building suitable for a hospital, two school-houses, one blacksmith shop, one building for wagon and plough maker and one carpenter and joiner shop, one dwelling for each, two millers, one farmer, one superintendent of farming operations, two school-teachers, one blacksmith, one wagon and plough maker, one carpenter and joiner, to each of which the necessary outbuildings. To purchase and keep in repair for the term of twenty years all necessary mill fixtures and mechanical tools, medicines and

hospital stores, books and stationary for schools, and furniture for employes.

The United States further engage to secure and pay for the services and subsistence, for the term of twenty years, (of) one superintendent of farming operations, one farmer, one blacksmith, one wagon and plough maker, one carpenter and joiner, one physician, and two school-teachers.

Article 5. The United States further engage to build for the head chiefs of the Walla-Walla, Cayuse, and Umatilla bands each one dwelling-house, and to plough and fence ten acres of land for each, and to pay to each five hundred dollars per annum in cash for the term of twenty-years. The first payment to the Walla-Walla chief to commence upon the signing of this treaty. To give to the Walla-Walla chief three yoke of oxen, three yokes and four chains, one wagon, two ploughs, twelve hoes, twelve axes, two shovels, and one saddle and bridle, one set of wagon-harness, and one set of plough-harness, within three months after the signing of this treaty.

To build for the son of Pio-pio-mox-mox one dwelling-house, and plough and fence five acres of land, and to give him a salary for twenty years, one hundred dollars in cash per annum, commencing September first, eighteen hundred and fifty-six.

The improvement named in this section to be completed as soon after the ratification of this treaty as possible.

It is further stipulated that Pio-pio-mox-mox is secured for the term of five years, the right to build and

occupy a house at or near the mouth of Yakama River, to be used as a trading-post in the sale of his bands of wild cattle ranging in that district: *And provided, also,* That in consequence of the immigrant wagon-road from Grand Round to Umatilla, passing through the reservation herein specified, thus leading to turmoils and disputes between Indians and immigrants, and as it is known that a more desirable and practicable route may be had to the south of the present road, that a sum of not exceeding ten thousand dollars shall be expended in locating and opening a wagon-road from Powder River or Grand Round, so as to reach the plain at the western base of the Blue Mountain, south of the southern limits of said reservation.

Article 6. The President may, from time to time at his discretion cause the whole or such portion as he may think proper, of the tract that may now or hereafter be set apart as a permanent home for these Indians, to be surveyed into lots and assigned to such Indians of the confederated bands as may wish to enjoy the privilege, and locate thereon permanently, to a single person over twenty-one years of age, forty acres, to a family of two persons, sixty acres, to a family of three and not exceeding five, eighty acres; to a family of six persons and not exceeding ten, one hundred and twenty acres; and to each family over ten in number, twenty acres to each additional three members; and the President may provide for such rules and regulations as will secure to the family in case of the death of the head thereof, the possession and enjoyment of such permanent home and

improvement thereon; and he may at any time, at his discretion, after such person or family has made location on the land assigned as a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which condition shall continue in force until a State constitution embracing such land within its limits, shall have been formed and the legislature of the State shall remove the restriction: Provided, however, That no State legislature shall remove the restriction herein provided for without the consent of Congress: *And provided, also*, That if any person or family, shall at any time, neglect or refuse to occupy or till a portion of the land assigned and on which they have located, or shall roam from place to place, indicating a desire to abandon his home, the President may if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family their portion of the annuities or other money due them, until they shall have returned to such permanent home and resumed the pursuits of industry, and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of Indians residing on said reservation; *And provided, also*, That the head chiefs of the three principal bands, to wit, Pio-pio-mox-mox, Weyatenatemany, and Wenap-snoot, shall be secured in a tract of at least one hundred and sixty acres of land.

Article 7. The annuities of the Indians shall not be taken to pay the debts of individuals.

Article 8. The confederated bands acknowledge their dependence on the Government of the United States and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredation on the property of such citizens, and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities; nor will they make war on any other tribe of Indians except in self-defense, but submit all matter of difference between them and other Indians, to the Government of the United States or its agents for decision and abide thereby; and if any of the said Indians commit any depredations on other Indians, the same rule shall prevail as that prescribed in the articles in case of depredations against citizens. Said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians.

Article 9. In order to prevent the evils of intemperance among said Indians, it is hereby provided that if any one of them shall drink liquor, or procure it for others to drink, (such one) may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Article 10. The said confederated bands agree that, whenever in the opinion of the President of the United

States the public interest may require it, *that* al. roads highways and railroads shall have the right of way through the reservation herein designated or which may at any time hereafter be set apart as a reservation for said Indians.

Article 11. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said I. I. Stevens and Joel Palmer, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the said confederated bands, have hereunto set their hands and seals, this ninth day of June, eighteen hundred fifty-five.

Isaac I. Stevens (L.S.)

Governor and Superintendent Washington Territory.

Joel Palmer

Superintendent Indians Affairs, O.T. (L.S.)

Pio-pio-mox-mox, his x mark, chief of Walla-Wallas (L.S.)

Meani-teat-ee Pierre, his x mark (L.S.)

Weyatenatemany, his mark, chief of Cayuses (L.S.)

Wenap-snoot, his x mark, head chief of Umatilla (L.S.)

Kamaspello, his x mark (L.S.)

Steachus, his x mark (L.S.)

Howlish-wampo, his x mark (L.S.)

Five Crows, his mark (L.S.)

Stocheania, his x mark (L.S.)

Hu-howlish, his x mark (L.S.)

Lin-tin-met-cheania, his x mark (L.S.)

Petamyo-mox-mox, his x mark (L.S.)

Watash-te-waty, his x mark (L.S.)

She-yam-na-kon, his x mark (L.S.)

Qua-chim, his x mark (L.S.)

Te-walca-temany, his x mark (L.S.)

Keantoan, his x mark (L.S.)

U-wait-quaick, his x mark (L.S.)

Tilch-a-waix, his x mark (L.S.)

La-ta-chih, his x mark (L.S.)

Kacho-rolich, his x mark (L.S.)

Kanocey, his x mark (L.S.)

Som-na-howlish, his x mark (L.S.)

Ta-we-way, his mark (L.S.)

Ha-hats-me-cheat-pus, his x mark (L.S.)

Pe-na-cheanit, his x mark (L.S.)

Ha-yo-ma-kin, his x mark (L.S.)

Ye-ca-lox, his x mark (L.S.)

Na-kas, his mark (L.S.)

Stop-cha-yeou, his x mark (L.S.)

He-yeau-she-koaut, his x mark (L.S.)

Sha-wa-way, his x mark (L.S.)

Tam-cha-key, his x mark (L.S.)

Te-na-we-na-cha, his x mark (L.S.)

Johnson, his x mark (L.S.)

Whe-la-chey, his mark (L.S.)

Signed in the presence of—

James Doty, secretary treaties

Wm. C. McKay, secretary treaties

C. Chirouse, O. M. I.

A. D. Pamburn, Interpreter

John Whitford, his x mark, Interpreter

Mathew Dofa, his x mark, Interpreter

William Craig, Interpreter

James Coxey, his x mark, Interpreter

Patrick McKenzie, Interpreter

Arch. Gracie, jr. brevet second lieutenant, Fourth Infantry

R. R. Thompson, Indian agent

R. B. Metcalfe, Indian sub-agent.

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON
Civil No. 77-59

JUDGMENT

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, PENDLETON, OREGON, et al.

Plaintiffs,

vs.

H. G. MAISON, Salem, Oregon, individually and as Superintendent, Department of State Police of the State of Oregon, et al.

Defendants.

The court having this day made Findings of Fact and Conclusions of Law in this proceeding, now, therefore, in accordance therewith, it is

ORDERED, ADJUDGED, AND DECREED that the Confederated Tribes of the Umatilla Indian Reservation and the members thereof have a right, privilege, and immunity afforded them under the Treaty of June 9, 1855, between said Tribes and the United States of America, to catch salmon and steelhead for subsistence purposes at all usual and accustomed stations on tributaries of the Columbia and Snake rivers in Oregon, including the John Day, Walla Walla, Grande Ronde, and Imnaha river systems, without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto.

ORDERED, ADJUDGED, AND DECREED that it is not necessary at this time that the court grant any in-

junctive relief, but jurisdiction is reserved to grant such relief in an appropriate proceeding upon application by the plaintiffs and a proper showing of the necessity thereof.

DATED June ——, 1960.

(s) GUS J. SOLOMON
JUDGE

Presented by:

Frank E. Nash
CHARLES F. LUCE
Charles F. Luce
Counsel for Plaintiffs

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In the

Supreme Court of the United States

October Term, 1963

No. 299

H. G. MAISON, individually and as Superintendent, Department o State Police of the State of Oregon; ROBERT Y. THORNTON, individually and as Attorney General of the State of Oregon; J. H. VAN WINKLE, MAX WILSON, RALPH T. RENNER, KENNETH G. DENMAN, and ROLLIN E. BOWLES, individually and as members of the State Game Commission of the State of Oregon; and GEORGE L. ANDERSON, individually and as District Attorney of Union County, Oregon,

Petitioners,

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, and Elias J. Quaempts, William Minthorn, David S. Hall; Joseph T. Johnson, Arthur Motanic, Joseph T. Williams, Louise M. Elk, and Jesse Jones, each on its or his own behal and as representative of the members of the Co ederated Tribes of the Umatilla Indian Reservatio. Pendleton, Oregon,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

FRANK E. NASH
MARK C. McCLANAHAN
KING, MILLER, ANDERSON, NASH & YERKE
American Bank Building
Portland, Oregon 97205
Counsel for Respondents

DAILY JOURNAL OF COMMERCE

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In the Supreme Court of the United States

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H. G. MAISON, individually and as Superintendent, Department of State Police of the State of Oregon;
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GEORGE L. ANDERSON, individually and as District Attorney of Union County, Oregon,

Petitioners

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, and Elias J. Quaempts, William Minthorn, David S. Hall, Joseph T. Johnson, Arthur Motanic, Joseph T. Williams, Louise M. Elk, and Jesse Jones, each on its or his own behalf and as representative of the members of the Confederated Tribes of the Umatilla Indian Reservation, Pendleton, Oregon,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Contrary to Petitioners' apparent suggestion (Pet 3), it would not be necessary for this court to decide whether the State lacks authority to regulate Respondents' fishing under any and all conceivable circumstances or whether Federal courts are authorized to prescribe methods of conserving fish.

Properly stated, the issue presented is whether, under the particular facts found by the lower courts to exist in this case, the State may so utilize its general regulations, adopted for the ostensible purpose of conservation, as to prevent Respondents during extended periods of each year from taking fish for subsistence purposes only, at their usual and accustomed stations, in their pursuit of the right reserved by them and confirmed by the United States in the Treaty of June 9, 1855 (12 Stat 945, II Kappler 694), to take fish "at all * * * usual and accustomed stations * * *." The particular facts so found are:

(1) No limitations on such fishing are necessary for the conservation of fish.

(2) The general regulations attempted to be applied to Respondents were adopted in complete disregard of Respondents' needs and without any evidence or knowledge of the extent or effect of their fishing, other than that they had never been known to destroy or threaten any fish run.

(3) There are alternative conservation measures which may be taken to eliminate any theoretical harm done by such fishing.

RESPONDENTS' STATEMENT

Petitioners' "Statement" (Pet 3-9), exclusive of the

argumentative material on pages 7 to 8, is generally accurate. However, in the following particular respects, Petitioners' statement is inaccurate or insufficient:

This case concerns the subsistence fishing (as distinguished from commercial fishing) of the Confederated Tribes of the Umatilla Indian Reservation on certain tributaries of the Columbia and Snake rivers in Oregon which are in the general vicinity of the Umatilla Indian Reservation. The decree of the District Court, which was affirmed by the Court of Appeals for the Ninth Circuit, is a declaratory judgment, and provides in part as follows:

> "ORDERED, ADJUDGED, AND DECREED that the Confederated Tribes of the Umatilla Indian Reservation and the members thereof have a right, privilege, and immunity afforded them under the Treaty of June 9, 1855, between said Tribes and the United States of America, to catch salmon and steelhead for subsistence purposes at all usual and accustomed stations on tributaries of the Columbia and Snake rivers in Oregon, including the John Day, Walla Walla, Grande Ronde, and Imnaha river systems, without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto." (Pet. Appendix F, p 50)

The record contains no support whatsoever for Petitioners' statement (Pet 4) to the effect that, following the completion of The Dalles Dam at Celilo Falls on the Columbia River in 1956, the Umatillas "began to"

fish in other places, setting the stage for this case." All the evidence in this case is to the effect that the Umatillas have traditionally and consistently utilized their usual and accustomed fishing places on the Blue Mountain streams involved in this case for subsistence fishing. Although it is true that many Umatillas engaged in substantial fishing activities at Celilo Falls prior to the inundation thereof in 1956, such fishing was primarily for commercial purposes. The fishing on the Blue Mountain streams is now and always has been for subsistence purposes. The condition of the anadromous fish by the time they reach the streams here involved is such that they are not commercially salable (See R 33-34, 38, 53-54, 58 (Finding 17), 85, 165-166).

Prior to 1914, the Umatillas also utilized the Umatilla River which flows through the Umatilla Reservation as a source of subsistence fishing. In about 1914, the United States Bureau of Reclamation constructed an irrigation dam about three miles above the mouth of the Umatilla River, outside the Reservation, and substantially destroyed the salmon and steelhead runs in that river. At the present time, the Blue Mountain streams here involved are the only practicable sources of supply for subsistence salmon and steelhead for many Indian families on the Reservation, who continue to depend upon these fish for their livelihood (R 88, 165-168).

The record also contains no information concerning the amounts referred to by Petitioners (Pet 4) as paid the Umatillas as a result of the inundation of Celilo Falls or the reasons therefor. We consider it highly inappropriate for Petitioners to refer to this matter at this stage of the proceedings, especially when they well know that the settlement agreement involved only the subordination of the Umatillas' rights in a limited area of the Columbia River in the vicinity of The Dalles, Oregon, many miles from the streams here involved, and that it has no relevance, in fact or in law, to the issue in this case.

Finally as pointed out in the argument, Petitioners' statement that when the salmon is in these streams it "is at its lowest ebb as a food item, but at its highest value as a propagator of its kind" (Pet 6) depends entirely upon one's point of view.

ARGUMENT

Summary of Argument

1. The lower courts were clearly right in finding that the restrictions on Respondents' subsistence fishing in the Blue Mountain streams are "not necessary for the conservation of fish."

A. Although Respondents have been engaged for 100 years in the fishing now sought to be pre-

prevented, the evidence shows that the fish runs involved have not been damaged by them and have been greatly increasing for 15 years.

B. The attempted restrictions seek to serve the interests of all other citizens without any regard whatsoever for the Treaty rights involved or the subsistence needs of the Indians.

C. Alternative conservation measures are available to eliminate any theoretical possibility of harm from Respondents' fishing.

2. The application of the test established by this court in the *Tulee* decision involves no new or novel principles requiring this court's consideration.

A. The lower courts correctly applied the test established by this court.

B. The Federal courts must continue to ascertain whether State-imposed restrictions on Indians' Treaty fishing rights are in fact necessary for the conservation of fish.

I.

The lower courts were clearly right in finding that the restrictions on respondents' subsistence fishing in the Blue Mountain streams are "not necessary for the conservation of fish."

This case does not require a decision on the basic question of whether the State is without any authority whatsoever to regulate Indians' fishing at Treaty fishing places outside their reservations. As much as any case, this one is "bottomed on its own facts." On the basis of the facts found in the two lower courts, it appears that in fact no restrictions on the subsistence fishing by members of this Indian tribe on the particular streams involved are now necessary; that the general regulations involved were adopted in 1958 without any regard or concern for the needs of the tribe or its members and without any evidence or knowledge concerning the effect or extent of their fishing, except that they had never been known to damage or threaten any fish run in the more than 100 years they have fished at these fishing places; and that there are at least three alternative conservation measures which may be adopted to prevent any harm to the fish runs which, according to the State, theoretically might result from their fishing.

A. Lack of Necessity. The Court of Appeals commented as follows concerning the necessity for the limitations attempted:

> "The trial judge could justifiably doubt the validity of the experts' conclusions in view of the other evidence that the number of fish taken by the plaintiffs is only a small percentage of the total salmon

and steelhead harvest; that the plaintiffs have never, in over a century, destroyed a salmon run in the Blue Mountain streams or so depleted a run that destruction was threatened; and that, not only has the number of fish in these streams been increasing in recent years, the population of the Confederated Tribes is small and probably is declining" (Pet., Appendix A, p 26; 311 F2d at p 173)

Included in the evidence supporting this analysis is the following:

Exhibits Nos. 14 to 30 summarize the salmon and steelhead runs and catches in the Columbia System. They were prepared by Doctor Richard Van Cleve, Dean of the College of Fisheries, University of Washington, on the basis of official records of State and Federal agencies and were introduced without objection (R 69-70).

At the time of trial the most recent year for which complete statistics of the chinook catch were available was 1957. In that year, of the 1,256,000 estimated run of Columbia River chinook salmon, the commercial fishermen's nets took 782,200, or more than 62 per cent. The sports fishermen of Oregon, Washington and Idaho took another 134,600 chinook. Of the entire run of chinook salmon the commercial and sports fishermen caught 916,000 fish, or approximately 73 per cent of the run (Exs 14, 19 and 20).

In 1957 the Washington State Department of Fisheries estimated the run of summer steelhead in the Columbia as 235,800 fish. This figure excludes sports catch and ocean troll catch of steelhead (Ex 16). In the same year, 1957, the gill net catch of all steelhead in the Columbia River was about 73,480 fish (figuring their weight as 10 pounds a fish, see Ex 21). The 1957 sports catch of all steelhead in Oregon was 24,783 fish (Ex 22); and in Idaho, 39,544 fish (Ex 23). Thus, the 1957 gill net and sports catch of Columbia River steelhead was approximately 137,807 fish.

The Blue Mountain Streams. On the Blue Mountain streams involved in this case there is no commercial fishing. But the State of Oregon does permit sportsmen to catch salmon and steelhead during most of the year. The 1957 sport catch figures published by the Oregon Game Commission are as follows:

River	*Salmon*	*Steelhead*	*Total*
Catherine Creek	177	18	195
Grande Ronde River	189	504	693
Imnaha River	302	508	810
John Day River	86	2,149	2,235
Minam	82	43	125
Walla Walla River	14	101	115
Wallowa River	134	107	241
Wenaha River	113	76	189
	1,097	3,668	4,603

(Exhibit 15)

There is no evidence that in 1957 or any other year Indian fishermen, trying to catch salmon and steelhead in these same streams to feed their families, caught as many as the 4,603 fish that white sportsmen caught for pleasure.

An important aspect of the salmon conservation problem is that *since 1944 the spring runs of chinook have been increasing*. As shown by Exhibit No. 16, the spring chinook run in 1944 was 56,300 fish. Since then it has continuously increased to 194,000 salmon in 1958. *It is the spring run of chinook that spawns in the Blue Mountain streams involved in this case* (R 91, Pet 4).

Consistent with the general increase of spring chinook runs in the Columbia is the increase of such runs in the two principal tributaries involved in this case, the Grande Ronde and the Imnaha rivers. In 1948, the chinook escapement in these streams was estimated at 900 and 1,500 fish, respectively. In 1956, it had increased to 8,092 and 5,030 fish (Ex 17). In 1958, the Oregon Game Commission estimated that 21,500 chinook entered the Grande Ronde, and 10,000 chinook entered the Imnaha (Ex 18).

Umatilla Subsistence Fishing. The fishing by the tribe and its members on the Blue Mountain streams involved in this case is for "subsistence" purposes only.

Subsistence fishing is fishing for their own use, as distinguished from commercial and sports fishing. (The fish here involved are not commercially salable.) Tribal members have traditionally utilized these streams for subsistence fishing. Of the 1,208 present members of the tribe, there are less than one half still living on the reservation, some of whom, of course, are aged or children. Most of those who use the streams in question live on the reservation. Sam Kash Kash, a tribal member, testified that the catching of 50 fish on one trip would be such an occurrence that it would be generally known. Neither Petitioners nor others have reason to believe that these Indians have ever destroyed or threatened the destruction of a fish run (See Finding 17, R 58; R 38, 44, 72-74, 79, 81, 85, 108, 116, 119-120, 125, 127-128, 133, 166)

One of Petitioners' experts was Richard T. Pressey, Chief Biologist and Supervisor of Research for the Department of Fisheries of the State of Washington, who testified on the basis of conservation principles generally. His testimony included the following:

> "The Court: Do you know how many Indians fish on those streams?
>
> "The Witness: No, sir; I do not.
>
> "The Court: Is it your view, based upon the reading which you have done, that there is real danger of the fish in the Blue Mountain streams being destroyed?

"The Witness: I believe so, if that fishing is up on the spawning grounds. This is something that should not be done, in my opinion.

"The Court: Is it because you believe that the Umatillas are not as cooperative as the Indians in Washington with whom you have had good relations?

"The Witness: Well, I can only speak from hearsay on that as I have only entered into—or that our Department has only entered into very preliminary negotiations with the Umatillas in regard to the Columbia River fisheries, and I am not intimately acquainted with that Tribe.

"The Court: Is there anything about the Umatillas which leads you to believe that they will try to completely wipe out the fishing in those Blue Mountain streams because they will fish it so hard?

"The Witness: Sir, I couldn't answer that. I don't know. * * *

"The Court: If you were acquainted with the fact that over a period of years they have fished without restriction and the runs are not being depleted, would that alter your opinion in any way?

"The Witness: *If the runs are not being depleted and there is no sign of depletion, there would be no need of regulation* * * *

"The Court: But the pragmatic test is one that determines whether the fish have actually been depleted even though unrestricted fishing has been permitted?

"The Witness: Yes, if you can deplete the stocks there, then you know you are in bad trouble." (R 149-152)

In the 100 years since the ratification of the Treaty of June 9, 1855, the State authorities had never attempted to interfere with the Umatillas' fishing (R 166). The State chose to do so in August of 1958 at a time when the fish runs involved had been dramatically increasing for 15 years. The lower courts simply held that, in view of the circumstances, such restrictions could not be considered "necessary for the conservation of fish" under any theory, in law or in fact, or through the exercise of any "judgment."

B. Failure to Consider Indians' Needs. After noting that none of Petitioners' experts had any knowledge of any harm resulting from the Umatillas' fishing, the Court of Appeals stated:

> "In Dr. Rayner's view, 'conservation' is a term which involves a compromise of the competing interests of the many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that, by 'conservation,' the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word 'conservation' in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, 'I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether.'
>
> "Such a statement is not evidence of that neces-

> sity for conservation' required by the Tulee case." (Pet, Appendix A, pp 24-25; 314 F2d at p 173)

These statements are fully supported by the record (R 105-107, 189).

Petitioners say that when the salmon is in these streams it is

> "* * * at its lowest ebb as a food item, but at its highest value as a propagator of its kind * * *. (Pet 6)

Whose food? Whose value?

According to the testimony, to feed their families many Umatilla Indians need to take more salmon than they can take by sportsmen's methods, they cannot use set gill nets or other commercial systems on the main stem of the Columbia River because of the costs and difficulties involved and other Oregon fishing regulations, and the Blue Mountain streams are their only practicable sources of supply (R 71-74, 88-89, 113, 130-132, 169). The Umatillas' interest in fishing on their usual and accustomed stations on the streams here involved fit neither of the two goals selected by Oregon —food obtained through commercial fishing in the lower Columbia, or recreation through angling on the upper streams.

The result is that the lower courts have simply held that the "determination" of the necessity which Petitioners claim the exclusive right to make (Pet 13) cannot stand when it is made without evidence of harm, in ignorance of the facts, and for the purpose of serving the needs of all the other citizens at the expense of the Indians who have preserved a part of their former culture.

Petitioners seemingly concede that their "determination" is not conclusive if their regulation "was not supported by substantial evidence, or * * * not reasonable or * * * arbitrary" (Pet 13). On the facts of this case the restrictions on the Umatillas' fishing offend each of these standards.

C. Alternative Conservation Measures. The District Court found:

> "18. The Court finds that there are alternative methods to the restriction of Indian fishing on Blue Mountain streams whereby the State of Oregon may achieve the conservation of salmon and steelhead runs: for example, permitting a greater escapement of spring chinook salmon through the commercial and sports fishery on the Columbia River below Bonneville Dam; reducing or eliminating the sports catch of salmon and steelhead on the Blue Mountain streams; and arranging substitute fishing sites for plaintiffs on the Columbia River to relieve fishing pressure on the spawning beds.
>
> "19. Plaintiffs have expressed their willingness to negotiate with the Oregon State Game Commis-

sion, or other appropriate officials of the State of Oregon, for the substitution of subsistence salmon and steelhead fishing sites on the main stem of the Columbia River for usual and accustomed fishing sites on the spawning beds of tributaries of the Columbia River. The Oregon State Game Commission has rejected this offer." (Findings 18 and 19, R 58-59)

The Court of Appeals considered that the availability of the alternative of eliminating the sports fishing of salmon and steelhead on these same spawning grounds was sufficient to prevent the restrictions on the Umatillas' fishing there and did not consider the other alternatives (Pet. Appendix A, p 27; 314 F2d p 174).

We believe Petitioners' claim that the lower courts have "substituted [their] • • • view concerning what should be done" (Pet 13) is an inaccurate statement of the purpose of these holdings. All the Court of Appeals held is that the State cannot claim a "necessity" for preventing Umatillas from taking fish needed for food when it permits sportsmen to take more of the same fish, in the same places, for pleasure. The District Court applied the same reasoning regarding limitations on the tremendous commercial catch below Bonneville Dam and also could not believe the claims of necessity when the State officials refused to consider the Umatillas' offer to fish where, under Petitioners' theories (R 116), the theoretical possibility of harm would be alleviated.

2.

This application of the test established by this Court does not require this Court's consideration.

In *Tulee v. Washington* (1942) 315 US 681, this court held that the State of Washington could not apply its general license law to Yakima Indians fishing at their usual and accustomed fishing stations. The Yakimas' treaty (12 Stat 951, II Kappler 698) was negotiated at the same treaty council, was executed the same day, was ratified the same day and, so far as pertinent here, is virtually identical to the Umatillas' treaty. The court stated:

> "* * * while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary* for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. * * *
>
> "* * * The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished *otherwise*, that the imposition of license fees is *not indispensable* to the effectiveness of a state conservation program." (315 US 684, 685)

The Court of Appeals for the Ninth Circuit has applied this decision three times. In *McCauley v. Makah Indian Tribe* (9 Cir. 1942) 128 F2d 907, it reversed a

decision by the District Court for the Western District of Washington which, on a motion for judgment on the complaint, had enjoined State officials from interfering with the Makah Indians' fishing in the Hoko River in Washington, regardless of the purpose of the fishing or the gear employed. Although the Treaty provision was in all material respects the same as the Umatillas', the Ninth Circuit held that:

> "Clearly, allowing such fishing is not in accord with Tulee v. State of Washington, 62 S.Ct. 862, 86 L. Ed.—, which was decided after the judgment here appealed from. • • •
>
> "The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens. It well may be that the Tulee case has decided all that the parties are seeking to determine regarding the Makah treaty provision. However, in reversing it is with permission to the appellees to amend their complaint and present the issue of their right to such claimed allowable methods of fishing, specifically described, and not by such a general term as 'other Indian fishing gear,' as they may be advised." (128 F2d 870

The same treaty was before that court in *Makah Indian Tribe v. Schoettler* (9 Cir, 1951) 192 F2d 224. This time the State was attempting to apply its general regulations to the Indians with the result that only hook and line could be used. This meant *in fact* that

really effective fishing could not be conducted because salmon do not eat after entering fresh water to spawn. The court held:

> "The Supreme Court held in the Tulee case that where a treaty guarantees certain fishing rights to Indians and a state regulation impairs this right, the state must prove that its regulation is 'necessary', and further held that such proof of the regulation there involved had not been made. . . .
>
> "We are not here concerned, as we were in McCauley v. Makah Indian tribe, 9 Cir., 128 F.2d 867, with any particular form of regulation. We do not question the right to enact regulations which will permit fishing in the Hoko River to the extent that will give the Makahs their treaty right to fish there without depletion of the fall run of salmon. We hold no more than that the appellee has not sustained its burden of proof that the instant regulations preventing the Makahs from the taking of fish in the Hoko are 'necessary for the conservation of fish' in the fall run of salmon in that river." (192 F2d 226)

The court listed as three factors which supported its belief that the particular regulations were not necessary the facts that (1) a partial stoppage of fishing during the run would in fact fully preserve it, (2) gill netting was allowed in other Western Washington streams, and (3) no attempt had been made to make a cooperative agreement with the Makahs which would both regulate and allow them the salmon "necessary for their food and support." (192 F2d at 225)

That court's third application of the *Tulee* decision was in the case now presented for review. In affirming the District Court, it stated:

> "Because the court found that no conservation was necessary its broadly worded judgment, applying to any laws or regulations of the State of Oregon, is proper. Of course, a substantial change in conditions may warrant the later imposition of restrictions upon plaintiffs' fishing." (Pet. Appendix A, p 26; 314 F2d at p 173)

We do not agree with Petitioners' claim that the lower courts "have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." (Pet 14) On the contrary, they have closely followed the directions implicit in *Tulee*. In *Tulee* and *Makah*, too, the State authorities considered that their general regulations were in the interests of conservation and should apply to the Indians equally with all others. In both cases, a Federal court found the contentions fallacious as reasons for restricting Treaty fishing rights and pointed to the fact that there were other means which could accomplish the general conservation purpose and yet allow the Indians the food which they need for their subsistence.

We also believe that neither *Ward v. Race Horse* (1896) 163 US 504, *New York ex rel Kennedy v. Becker*

(1916) 241 US 556, nor *Organized Village of Kake v. Egan* (1962) 369 US 60, indicates any error by the lower courts.

Ward v. Race Horse, held that the admission of Wyoming to the Union on an "equal footing" with the other states had the effect of abrogating *pro tanto* an Indian treaty's provision granting "the right to hunt upon the unoccupied lands of the United States so long as * * * peace subsists * * * on the boarders of the hunting districts." (163 US 505) We believe that the dissent by Mr. Justice Brown in that case well demonstrated the weakness of the majority's reasoning regarding "equal footing." However that may be, the "equal footing" doctrine has no applicability here for two reasons. First, the Treaty here involved was ratified March 9, 1859 (12 Stat 945), subsequent to the admission of Oregon to the Union on February 14, 1859 (11 Stat 383). Second, this court held in *United States v. Winans* (1905) 198 US 371, 381, and *Tulee v. Washington* (1942) 315 US 681, that the corresponding provision in the Yakima Treaty survived the admission of Washington and necessarily held in *Seufert Bros. Co. v. United States* (1919) 249 US 194, that the same provision applied in Oregon. See, also, *Anthony v. Veatch* (1950) 189 Or 462, 485, 220 P2d 493, 503, 221 P2d 575.

Moreover, in view of the timing of ratification and

the foregoing interpretations, the rationale of *Ward v. Race Horse* actually works against Petitioners' position here, for the court there assumed that there was a necessary inconsistency between the continuation of the Indians' Treaty rights and the existence of State power to regulate them.

New York ex rel Kennedy v. Becker is distinguishable on the ground that it was in the form of a private grant of title to an individual with a reservation of a private easement in the Indians. As a matter of interpretation, the court held that the parties had not intended to limit the powers of the State. It was held in *United States v. Winans*, supra, and *Tulee v. Washington*, supra, that the powers of the State were limited by the Yakima treaty.

Organized Village of Kake v. Egan, supra, is likewise inapposite. It involved neither treaty rights nor any other Federally recognized rights. The holding of the court was that unrecognized, strictly aboriginal rights were subject to Alaska's prohibition of fish traps in the absence of a Federal expression to the effect that it lacked such power. On the spectrum of decisions involving Indians' fishing rights, the companion case of *Metlakatla Indian Community v. Egan* (1962) 369 US 45, is actually closer on its facts to the present case. In *Met-*

lakatla, the court held that Alaska's anti-fish trap law could not restrict the Indians in a "reservation" created by Congress subject to Federal regulations, even though it was not a reservation in "Indian Country" but was subject to State civil jurisdiction under 18 USC Sec 1162 and 28 USC Sec 1360. The analogy lies in the facts that the Umatillas' Treaty fishing right in "usual and accustomed stations" is in the nature of a "reservation" (*United States v. Winans*, supra, at 198 US 381) and they are likewise subject to 18 USC Sec 1162 and 28 USC Sec 1360, passed in 1953 (67 Stat 588). As noted in *Metlakatla*, subsection (b) of 18 USC Sec 1162 specifically provides:

> "Nothing in this section * * * shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

But these other decisions are beside the mark. *Tulee* held that states could regulate the rights here involved if "necessary for the conservation of fish" but invalidated the regulations before it because "their regulatory

purpose could be accomplished otherwise" and they were "not indispensable to the effectiveness of a state conservation program." (315 US 681, 685) Unless restrictions may somehow be necessary in law though not necessary in fact, it is clear that the lower courts have correctly applied this test. As in *Tulee* and *Makah Indian Tribe v. Schoettler* (9 Cir. 1951) 192 F2d 224, the Court of Appeals in this case was confronted with regulations which could be applied to the Indians only if their treaty accords "no right at all which the state is bound to respect in making its fishing regulations." (192 F2d at p 226)

The record of this case demonstrates better than any theoretical discussion the reason the Federal courts must continue to require proof in each case that the particular limitations attempted are in fact necessary for conservation where the treaty rights apply. The record shows that, however unfortunately, a famous statement from the nineteenth century remains true in many respects:

> "These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food * * *. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the trea-

> fies in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen." (*United States v. Kagama* (1886) 118 US 375, 383-384)

Faced with the State's value judgment under which their usual and accustomed fishing stations were in effect to be appropriated to breed the salmon and steelhead destined for the commercial fishermen's nets and the sportsmen's creel, the Umatillas have sought and received this promised protection from the courts below. There is no reason for further review of their decisions.

CONCLUSION

The Court of Appeals for the Ninth Circuit has applied the test established by this court in the *Tulee* decision in three cases, including this one, and has twice found that in fact the particular limitations on Indian fishing at Treaty protected fishing places were not "necessary for the conservation of fish." Its present decision is founded on a particular set of facts and presents no new or novel issues calling for this court's consideration.

It will be time enough to consider whether the State of Oregon has any power to regulate the exercise of

these Treaty rights when the State meets this test instead of trying to ignore the Treaty and the special needs it was intended to serve.

Respectfully submitted,

FRANK E. NASH
MARK C. McCLANAHAN
Counsel for Respondents